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No. 86-1327

In The

Supreme Court of the United States

October Term, 1986

MEDALLION KITCHENS, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

and

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, (UAW) and its LOCAL 1267,

Intervenor-Respondent.

On Petition For a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

INTERVENOR-RESPONDENT UAW'S BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF FACTS

On September 19, 1983, the members of the United Auto Workers Local 1267 began a lawful economic strike against their employer, Medallion Kitchens. Medallion immediately hired a number of replacement employees, explicitly informing each that he or she "would work up until the strike was over." (App. A-3)

On December 10, 1983, while the strike was still in progress and the replacement employees were still working, a large portion of Medallion's facility was destroyed by fire. Medallion then made efforts to contact the replacement employees and inform them of Medallion's plans to

resume production as soon as the fire damage could be repaired. No evidence was presented that these communications involved any issues related to the strike or to the replacement employees' likelihood of retaining their positions after the strike ended.

On December 19, 1983, the Union notified the employer that the strike was at an end and the employees would be unconditionally available to return to work effective December 26. Medallion did not allow the former strikers to return to work but instead continued to fill available positions with the strike replacements.[1]

The Union then filed unfair labor practice charges with the National Labor Relations Board (NLRB). The Union alleged that Medallion's conduct in refusing to offer reinstatement to former strikers unconditionally offering to return to work — and in continuing to call back strike replacements to fill available positions — violated Section 8(a)(3) of the National Labor Relations Act (NLRA). The Administrative Law Judge (ALJ), the NLRB, and the Eighth Circuit all agreed that the strike replacements had not been promised that their employment would continue beyond termination of the strike and that Medallion did not have any other "substantial and legitimate business reason" for refusing to reinstate the former strikers following their unconditional offer to return to work.

The ALJ, the NLRB, and the Eighth Circuit all therefore agreed that Medallion's refusal to recall the former strikers — and continuing preference for the strike replacements — constituted an unfair labor practice prohibited by Section 8(a)(3) of the NLRA.

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[1] By the time of the hearing before the Administrative Law Judge, 114 strike replacements had been called back to work; no former striker had been offered the opportunity to return.

REASONS FOR DENYING THE WRIT

This case presents nothing requiring review by this Court. The legal doctrine involved — that economic strikers retain their status as "employees" and therefore their right to be recalled to fill available positions if they abandon their strike and unconditionally offer to return to work — is almost as old as the National Labor Relations Act itself and has already been fully reviewed and codified by this Court. Moreover, there is no conflict of lower court authority on this topic, as Medallion concedes. Finally, as the Eighth Circuit properly found, the Board here correctly applied this well-settled doctrine to the facts of this case. (Part A, *infra*)

Nor need this Court review Petitioner's claim that it was deprived of its due process rights because the Board's General Counsel "switched theories" by putting in issue the "temporary" or "permanent" status of the strike replacements. As the Eighth Circuit properly noted, and as Medallion itself concedes, the hiring of permanent replacements is one of the well-settled affirmative defenses to an unfair labor practice charge based on a refusal to reinstate economic strikers unconditionally offering to return to work. It was, therefore, Medallion's burden to introduce evidence that the strike replacements were "permanent" rather than "temporary" if it wished to defend its conduct on that basis. (Part B, *infra*)

A. Barely three years after passage of the National Labor Relations Act by Congress, this Court decided the landmark case of *NLRB* v. *Mackay Radio*, 304 U.S. 333 (1938). This Court held in that case that economic strikers retain their status as "employees" — and therefore their right to be recalled upon making an unconditional offer to return to work — despite their

engaging in a strike activity.[2] The *Mackay* Court also created an exception to this rule: if an employer has, during the strike, hired permanent replacements for the striking employees, those permanent replacements need not be displaced to make room for returning strikers. 304 U.S. at 345-346.

The *Mackay* doctrine was reaffirmed and further codified by this Court in *NLRB* v. *Fleetwood Trailer*, 389 U.S. 375 (1967). The Court in *Fleetwood* reiterated that "unless the employer who refuses to reinstate strikers can show that his action was due to 'legitimate and substantial business justifications,' he is guilty of an unfair labor practice." 389 U.S. at 378 [quoting *NLRB* v. *Great Dane Trailers*, 388 U.S. 26, 34 (1967)]. Citing *Mackay*, the *Fleetwood* Court also noted that one such justification will be "when the jobs claimed by the strikers are occupied by workers hired as permanent replacements during the strike." 389 U.S. at 379. Finally, the *Fleetwood* Court clarified that the employer bears the "burden of establishing 'that it was motivated by legitimate objectives'" when it refuses to reinstate strikers abandoning their strike and unconditionally offering to return to work. 389 U.S. at 380 [quoting *NLRB* v. *Great Dane Trailers*, 388 U.S. 26, 34 (1967)]. See also *NLRB* v. *International Van Lines*, 409 U.S. 48 (1972).

As the Eighth Circuit found, the Board here properly applied these well-settled doctrines to the particular facts of this case. Thus, the Administrative Law Judge, as affirmed by the NLRB, found that Medallion had refused to reinstate former strikers making an un-

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[2] The Act itself requires this conclusion. The statutory definition of "employee" explicitly includes individuals "whose work has ceased as a consequence of, or in connection with, any current labor dispute . . . and who [have] not obtained any other regular and substantially equivalent employment." NLRA § 2(3), 29 U.S.C. § 152(3).

conditional offer to return to work, and that Medallion had failed to "meet [its] burden of justifying its failure to reinstate the strikers." (App. A-37)

The ALJ and the Board fully considered each affirmative defense raised by Medallion, and rejected each. Based on uncontroverted record evidence, the Administrative Law Judge, and the Board, found that the strike replacements hired by Medallion were not "permanent replacements" and therefore their presence did not justify Medallion's failure to reinstate the strikers.[3] Moreover, the Board and the Administrative Law Judge properly found that the interruption of Medallion's production by the fire did not, in itself, justify Medallion's continuing preference for strike replacements over strikers when it began calling employees back to work as the fire damage was repaired. Finally, based on a review of all the evidence adduced at trial, the Administrative Law Judge determined that Medallion's post-fire communications to strike replacements — on which Medallion places great weight — did not justify Medallion's refusal to recall the former strikers.[4]

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[3] Medallion's personnel director, for example, testified that he informed each strike replacement that he or she "would work up until the strike was over." (App. A-32; A-11)

[4] As the Administrative Law Judge stated, Medallion representatives communicated to replacement employees shortly after the fire "that [Medallion] would make an effort to get the Company operating as soon as possible and expected the employees to be back to work." (App. A-33) As found by the Administrative Law Judge, however, the record evidence did not demonstrate that the replacements "were ever informed" that their employment would survive termination of the strike. *Id.* The Administrative Law Judge therefore concluded that Medallion's post-fire communications with strike replacements were insufficient to "change[ ] [their status] to one of permanence." *Id.*

Medallion claims that the Eighth Circuit erred in assuming that retention of permanent replacements is the "only" basis on which to justify a refusal to reinstate former strikers. This argument is misplaced for two reasons.

First, none of the tribunals below failed to consider any of Medallion's asserted justifications. Instead, the Administrative Law Judge, the Board, and the Eighth Circuit, however, examined *each* of Medallion's proferred justifications and concluded that Medallion had failed to carry its burden on any ground. (See, e.g., App. A-8; A-11)

Second, all of the justifications offered by Medallion *did* involve the presence of the replacement employees and various communications to them. Medallion did not argue that any result of the fire — other than the post-fire communications to replacements — formed a basis for Medallion's refusal to recall the former strikers. Medallion did not argue, for example, that the former strikers' skills had become obsolete due to changes in the method of production. Nor did Medallion make any other argument unrelated to the replacements. This case, therefore, does not present any issue involving justifications for refusal to recall former strikers other than those — fully considered below — related to the retention of replacement employees.

It is well settled that "[i]t is the primary responsibility of the Board and not the courts 'to strike the proper balance between the asserted business justifications and the invasion of employee rights in light of the Act and its policy.'" *Fleetwood Trailer*, 389 U.S. at 378 [quoting *Great Dane Trailers, supra*, 388 U.S. at 33-34]. Moreover, this Court has concluded that the factual determinations of the National Labor Relations Board are to be upheld whenever "supported by substantial evidence on the

record considered as a whole." *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 488 (1951).

The Board here considered each of Medallion's purported justifications for refusing to recall the former strikers — the hiring of replacements, the fire, and the post-fire communications with the replacements. And the Board was well within the range of its discretion — and amply supported by record evidence — in concluding that none of those proffered justifications excused Medallion's continued refusal to offer available positions to the former strikers. Given that, and given the lack of conflict of lower court opinion on *any* of the issues presented here, there is no need for this Court to review the decision of the Eighth Circuit here.

B. Medallion argues here — as it did below — that the Board's General Counsel "switched . . . theories" by putting in issue the temporary or permanent status of the strike replacements. As the Eighth Circuit properly held, however, no such "switch" occurred. The Complaint alleged that Medallion "had failed and refused, and is continuing to fail and refuse, to recall any of the strikers" in violation of Section 8(a)(3) of the NLRA. (App. A-5) The ultimate theory of liability as found by the ALJ and affirmed by the Board and the Eighth Circuit, then, was that Medallion violated Section 8(a)(3) "[b]y discriminatorily failing to reinstate its [former striker] employees in accordance with their seniority after they had made an unconditional offer to return to work." (App. A-42) It is difficult to imagine a theory of liability more consistent with the pleadings.

Medallion's claim that it was prejudiced by the Board's putting in issue the question of the "permanent" or "temporary" status of the strike replacements does not support its argument here. By the clear language of the Complaint, Medallion was put on notice that its con-

duct in refusing to recall former strikers was at issue. As both *Mackay* and *Fleetwood* hold, then, the *employer* is free to raise as an affirmative defense a "substantial and legitimate business justification" — such as retention of permanent replacements — to rebut the inference of discriminatory intent which arises from such conduct. Medallion here was given ample notice of the nature of the unfair labor practice charged, and ample opportunity to assert any affirmative defenses it chose. As the ALJ, the Board, and the Eighth Circuit found, however, Medallion simply failed to prevail on any of the affirmative defenses on which it sought to rely — including Medallion's argument that the replacements were "permanent."

As the Eighth Circuit properly held, Medallion cannot now blame its failure to prevail on a particular affirmative defense on the failure of the Complaint to mention that potential affirmative defense. As the Eighth Circuit stated:

> "The General Counsel's theory was that Medallion recalled replacements and unlawfully refused to recall any of the strikers. This theory did not change during the proceedings. The burden was on Medallion to come forward with its own defense as to why the failure to reinstate did not amount to a violation of the Act.
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> * * *
>
> [T]he permanence issue was no more conceded by the General Counsel's silence than was any other possible defense Medallion might raise." (App. A-8)

Thus, Medallion is simply incorrect in claiming that "the General Counsel pled one charge while the ALJ and the Board found liability on another.", (Pet. at 17) No such "switch" in theories occurred, and Medallion

has therefore failed to demonstrate that this aspect of the decisions below requires review by this Court.[5]

CONCLUSION

For the foregoing reasons, the Petition should be denied.

Respectfully submitted,

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[5] Medallion does claim at one point that there is some conflict between two *other* circuit court decisions regarding the General Counsel's duty to amend pleadings when a switch in theories does in fact occur. (Pet. at 17) The cases that Medallion asserts are in conflict hold, respectively, that the "Board may either render a decision upon the issues *actually tried or* order an amendment to conform with the proof," *Clear Pine Moldings* v. *NLRB*, 632 F.2d 721, 728 (9th Cir. 1980), *cert. den.* 451 U.S. 984 (1981), and that a Circuit Court should enforce "a finding not based on the complaint, but *litigated* at the hearing," *NLRB* v. *Sunnyland Packing Co.*, 557 F.2d 1157, 1161 (5th Cir. 1977) [Emphasis supplied in both quotations]. The conflict asserted by Medallion is therefore more imagined than real. More importantly, even *if* the above holdings were deemed to conflict with each other, the present case does not create the vehicle to resolve such a conflict for the simple reason, as shown above, that *no switch* in theories occurred here. The technical question whether pleadings must be conformed to reflect issues "actually tried" or "litigated" is thus not presented here because the pleadings, as originally drafted, already conformed with the issue actually tried.